No. 3546.

IN EQUITY

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY, A Corporation,

Appellant

vs.

KOOTENAI COUNTY, a municipal corporation; W. A. THOMAS, as Treasurer and Ex-Officio Tax Collector of Kootenai County, Idaho; and C. O. Sowder, Clerk of the District Court and Ex-Officio Auditor and Recorder of Kootenai County, Idaho, and C. O. Sowder and W. A. Thomas, individuals,

Appellees.

REPLY TO PETITION FOR REHEARING.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

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Coeur d'Alene, Idaho.

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REPLY TO PETITION FOR REHEARING.

The petition for rehearing has to do entirely with the question of penalties.

THE FACTS.

The State Board of Equalization assessed appellant's prop-

erty in the state at $2,700,000. Of that sum there was distributed to the county of Kootenai $1,770,410, or 64 per cent of the total. (*)

This court has found the total value of the property of the appellant to be $3,620,500.One-half thereof is the sum of $1,-810,250, which under the opinion of this court, is fixed as the valuation of the property of this company for taxation purposes, 64 per cent of that, or the amount to be assessed in Kootenai County is the sum of $1,158,560.

THE TENDER.

The Washington Water Power Company tendered taxes upon the basis of 55 per cent of $1,770,410, or upon a valuation in Kootenai County of $973,725.50.

By the decision of this court, it has been determined that the value of the property of the appellant for the year 1918 in Kootenai County was $184,834.50 greater than the amount up-

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(*) This was shown at the trial, but the exhibit showing the distribution is not found in the record. The amount, however, can be easily determined in the following manner:

The complaint, paragraph XXXV, page 33, shows that the state and county tax levied against the property of the Washington Water Power Company in Kootenai County amounted to $26,556.16. The total state and county levy was 15 mills. (Kercheval, R. 290-291). This would show the valuation as above stated.

on which the tender of taxes was made.

The only question presented by the petition for rehearing is whether or not the Washington Water Power Company should be penalized for not having tendered the exact sum which the court ultimately found to be due.

By opinion of this court it is determined that the contention of the appellant with respect to the assessment of its property was made in good faith.

The court below granted partial relief. This court has granted additional relief.

It has been determined that appellant was discriminated against in the assessment of its property. There is no doubt but that the appellant tendered what it believed, and fairly was justified in believing, was a fair, lawful and equitable tax upon its property in Kootenai County. The fact that this court has fixed a different valuation for its property should not subject it to penalties because the valid portion, it may fairly be said, could not have been reasonably ascertained by the appellant. The learned district court believed that one valuation was a fair one; this court had disagreed with it.

RULE IN FEDERAL COURTS.

The question has been considered in the Federal Courts. We desire to cite the case of

Ritterbusch v. Atchison, T. & S. F. R. Co., 198 Fed. 46.

a decision of the Circuit Court of Appeals for the Eighth Cir-

cuit. The opinion is by Judge Sanborn. In the course of the opinion, Judge Sanborn says:

> "Finally, complaint is made because the court did not require the railway company to pay 18 per cent., but required it to pay only 6 per cent., per annum upon the portion of the taxes found to be justly due as a condition of the grant of the preliminary injunction. There was, however, no error here, because the state was demanding all these taxes, valid and void. No one could determine what part was valid or what part was void until the court adjudged the division. The 18 per cent. interest per annum upon taxes delinquent, imposed by section 6013 of Wilson's Statutes of Oklahoma of 1903, was in the nature of a penalty for the failure to pay the taxes when due. One who would enforce a penalty for the failure to pay a claim must demand the true amount. If he demands a larger amount no penalty is incurred."

Under this decision, the utmost that could be claimed would be legal interest (7 per cent in Idaho) upon the portion of the tax unpaid.

Such also is the rule deducible from the decision of the Supreme Court of the United States in

United States Trust Co. v. New Mexico, 183 U. S. 535.

The principle is correctly stated in

State ex rel First Thought Gold Mines v. Superior Court (Wash.), 193 Wash. 433, 161 Pac. 77.

That case involved solely the question as to whether or not penalties or interest by way of penalty should be entered in a case similar to the one at bar. The conclusions of the court are stated in the syllabus as follows:

"A tax partly void carries penalties on the valid portion after the date of delinquency, if the valid portion could have been reasonably ascertained and no tender was made.

(Syllabus 2)

Interest upon a delinquent tax is no part of the tax, but is sustainable only as a penalty (Syllabus 4)

A taxpayer's tender based upon what he claims is a fair valuation of his property is sufficient to prevent delinquent penalties from accruing, although the courts later fix the correct tax at a different figure but no lower than the amount demanded (Syllabus 6)

A penalty attaches only when the obligation is certain or can be made certain by proper calculation (Syllabus 7)

Suits to enjoin the collection of an excessive tax are equitable in nature, and the court will resort to equitable principles where possible." (Syllabus 8)

We cited from this opinion in our original brief, but we may be permitted again to refer to the language of the Washington court:

"That a tax, void entirely, gives no rights and will carry no penalties either by way of interest or otherwise; that a tax valid in part and void in part will carry a penalty either by way of interest or otherwise, to the extent that it is valid, if the amount of the tax which is valid can be reasonably ascertained, and, unless tender is made of the amount legally due, interest and penalties will attach from the date of delinquency; that where the amount of the tax is not divisible or the amount that ought to be paid cannot be readily ascertained, as where the tax is so

excessive as to warrant a holding that it is arbitrary and therefore constructively fraudulent as to the excess, the tax is nevertheless legal, within the legal power to tax, and is void only as to the unlawful excess. It is also well established that interest upon a delinquency is no part of a tax. It is sustained only as a penalty to insure prompt payment. People ex rel v. Peacock, 98 Ill. 172. And this is so whether the penalty be in the way of interest, the addition of a certain per cent, or by doubling the tax. Desty on Taxation, Sec. 130.

Interest upon delinquent taxes is a penalty, and no interest, within the general acceptation that it is a consideration for the forbearance of money. Evansville & Terre Haute R. Co. v. West, 37 N. E. 1009. This principle is most frequently illustrated in that line of cases holding that, where the Legislature passes a law for the taxation of property theretofore omitted as a subject of taxation, it cannot provide for interest from some anticedent date, but must provide some future time within which the tax must be paid after which interest may be demanded. In other words, even the state cannot take more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer, has failed or omitted to perform a duty imposed by law. Where a taxpayer has suffered an excessive assessment, he may tender a sum that he considers to be fair, considering the value of his property and the assessment of other like property. Landes Estate Company v. Clallam County, 19 Wash. 569, 53 Pac. 670. Dee also Miller v. Pierce County, 28 Wash. 110, 68 Pac. 358.

By resorting to the record in the main case, we find that relator made a tender, based upon a valuation which it is alleged is consistent with the valuation put upon other like property, which was refused, and which was made good by a tender in court. This, under any theory, ought to satisfy the law, for, if it be the duty of a taxpayer to make tender at all, where a tax is alleged to be fraudulently excessive, a show of willingness, accompanied by tender, is all that can be required, for the actual amount

due, being a subject of judicial inquiry, cannot be determined by the taxpayer. It may be greater or less * * *

Suits to enjoin the collection of an excessive tax are equitable, and the courts will resort to the principles of equity wherever it is possible to do so in deciding them. The statutes make no provision for the collection of interest from one who has obtained judgment that his tax was excessive. For a court of equity to impose a penalty in the way of interest, or to hold one who has not wilfully evaded a tax, or who has not failed or refused to pay the lawful tax, but on the contrary, has insisted upon his legal right to have the amount of his tax legally determined, would be the height of inequity."

Viewing the entire matter from an equitable standpoint, and this is an equitable case, it would seem that penalties should not be imposed in this case.

The legal rate of interest in Idaho is 7 per cent. The penalty which is sought is a 6 per cent penalty and then interest at 18 per cent upon the tax and penalty. It certainly would not be equitable to assess any such sum in a case where the county was demanding the whole tax, void as well as valid, and where it was impossible, until a judicial determination was had to equitably determine that part which was valid and that part which was void.

The tender was made upon a basis of valuation of $973,-725.50, whereas this court has held that the tax should be paid upon a value of $1,158,560. It is therefore evident that it was a substantial good faith tender.

May we be permitted in this behalf to say that the language in the opinion of the court, to-wit:

> 'Under these statutes one liable to pay taxes and who make a tender of an amount insufficient to cover the amount of the taxes lawfully assessed, becomes liable for all penalties and interest upon any sum found to be due.''

is not an unyielding rule in equity, and where it was impossible to determine what was valid and what was void until the court adjudged the division, the principle does not apply.

May we finally urge that the view of the Eighth Circuit Court of Appeals expressed by Judge Sanborn be, in the interest of uniformity of decision, approved here.

Respectfully submitted,

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